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No. 01-1773

In The
Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,

Petitioner,

v.

COUNTY OF SANTA BARBARA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a landowner, who knowingly acquired property that was subject to an irrevocable offer to dedicate a public access easement that his predecessor in interest voluntarily recorded in 1982, may claim that an agency's acceptance of the offer of dedication in 1999 constitutes a "taking" where the landowner's predecessor failed to challenge the permit condition requiring the offer of dedication and where both landowners have enjoyed the benefits of the permit for the past twenty years?

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INTRODUCTION

This petition is the latest in the series of actions by the owner of a 25-acre coastal estate who seeks to avoid the legal obligation to provide public access that his predecessor in interest voluntarily assumed twenty years ago when she accepted the benefits of a coastal development permit. The current landowner, Joseph Cole, trustee of the Stanford Farms Trust, requests that the Court review the *unpublished* decision of a California court of appeal rejecting Cole's claim that Santa Barbara County's acceptance of an irrevocable offer of dedication that was conveyed by his predecessor constituted a "taking." Cole's petition presents no issue worthy of this Court's review:

- The California court's decision rests on adequate and independent state law grounds because, under California law, the doctrines of res judicata and waiver bar a successor landowner from collaterally attacking permit conditions where the predecessor landowner did not challenge the permit condition but instead voluntarily complied with the permit condition and accepted the benefits of the permit. *See, e.g., California Coastal Comm'n v. Superior Court ("Ham"),* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567, (Cal.App. 1989); *Rossco Holdings, Inc. v. State of California,* 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990).

- Even if the lower court's decision is treated as the disposition of a federal claim, the petition should be denied. There is no conflict among the courts, because both state and federal courts have found that a landowner may not collaterally attack an offer of dedication required as a permit condition after the statute

of limitations has expired and where the landowner has obtained the benefits of the permit. *E.g., Ham, Daniel v. County of Santa Barbara,* 288 F.3d 375 (9th Cir. 2002), *pet. for cert. filed,* July 18, 2002.

- The California Court of Appeal's unpublished decision does not present an important issue of federal law; it simply resolves Cole's idiosyncratic "dual taking" theory that a landowner has the right to file a taking claim challenging the imposition of a permit condition requiring an irrevocable offer of dedication and then another taking claim after the irrevocable offer has been accepted. That a few landowners in the future may choose to bring similar untimely challenges to the acceptance of irrevocable offers of dedication does not transform Cole's claim into an important federal issue.

- Even putting aside that Cole's taking claim is barred by res judicata and waiver, Cole's taking claim based on the County's acceptance of the irrevocable offer is meritless, because it is based on a misunderstanding of California law regarding property dedications. Once a landowner records an irrevocable offer of dedication, his ability to exclude the public terminates upon acceptance of the offer. Cole, as a successor in interest, has no greater property rights than what his predecessor conveyed to him. See *Ojavan Investors v. California Coastal Comm'n,* 26 Cal.App.4th 516, 528, 32 Cal.Rptr. 103, (Cal.App. 1994), *cert. denied,* 513 U.S. 1148 (1995). Because Cole's predecessor had no right to object to the County's

acceptance of the irrevocable offer of dedication, neither did Cole.

Cole's petition for a writ of certiorari should be denied.

JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution and 28 U.S.C. section 1257 to review the judgment of the California Court of Appeal because that decision is based on adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cole's petition for a writ of certiorari fails to present any federal question because the California state courts decided this case on adequate and independent state law grounds.

STATEMENT OF THE CASE

In 1980 Francice Bushkin, then the owner of the property, applied to the California Coastal Commission for a coastal development permit to add a sunroom and deck to an existing guesthouse. Pet. App. at 1a-2a. On May 9, 1980, the Coastal Commission approved the permit. *Id.* The permit contained a condition requiring that Bushkin record an irrevocable offer to dedicate to the public a lateral access easement running across the coastal side of the property, which is separated from the improved part of

the real property by a 60-foot bluff. *Id.* In May 1982 Bushkin recorded the irrevocable offer of dedication and constructed the sunroom and the deck. *Id.* Bushkin did not file a legal action or otherwise challenge the permit condition. Nor is there any evidence or allegation that Bushkin believed that she was "coerced" when she complied with the permit condition.

In October 1995, the Stanford Farms Trust acquired the subject property as Bushkin's successor in interest. *Id.* The Trust has never denied that it was aware of the recorded offer of dedication when it acquired the property. On October 6, 1998, the Santa Barbara County Board of Supervisors held a public hearing to consider the acceptance of several outstanding irrevocable offers to dedicate public access easements. *Id.* A representative of the Trust appeared at the hearing and objected. On October 16, 1998, Gregory Parker, then the trustee of the Trust, recorded a document entitled "Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement." *Id.* at 3a. This document recited Parker's objection to the 1980 permit condition and stated that the offer to dedicate had been revoked and rescinded. *Id.*

On March 15, 1999, the Coastal Commission issued a "cease and desist" order, directing the Trust to cancel the Notice of Revocation. *Id.* In April 1999 Parker filed an action in San Francisco superior court against the Coastal Commission, objecting to the cease and desist order by seeking declaratory relief, rescission of the irrevocable offer to dedicate, and a writ of mandamus. *Id.* The Coastal Commission filed an answer and a cross complaint for violation of the cease and desist order. On January 3, 2000, the trial court issued an order that sustained the Coastal Commission's demurrer to the first two causes of

action of Parker's complaint without leave to amend on the grounds that the claims were barred by the doctrines of res judicata and waiver. *Id.* The California Court of Appeal denied Parker's petition for a writ of mandate to set aside the trial court's order. *Parker v. California Coastal Comm'n*, Cal.Ct.App. No. A090010. The California Supreme Court denied Parker's petition for review. Order of April 26, 2000.[1]

On February 15, 2000, after the Trust's defeat in the *Parker* case, County accepted the irrevocable offer of dedication. In April 2000, Joseph Cole (the Trust's new trustee) filed an action against the County (but not the Coastal Commission) in Santa Barbara County superior court. Pet. App. at 4a. This action challenges the legality of the very same irrevocable offer of dedication that the trial court in *Parker* upheld when it sustained the Coastal Commission's demurrer. In December 2000 the Santa Barbara trial court sustained County's demurrer without leave to amend. *Id.*

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[1] Following the California Supreme Court's action, the trustees then contended that the Commission's enforcement action was an improper Strategic Lawsuit Against Public Participation under California Code of Civil Procedure section 425.16. The trial court rejected this claim and, in an unpublished decision, the California Court of Appeal upheld the trial court's decision, finding that the Commission had established a prima facie showing that it would prevail in its enforcement action. *Cole v. California Coastal Comm'n,* Cal.Ct.App. No. A091220, Sept. 2, 2001. Following Cole's filing of this petition for a writ of certiorari, Cole settled his enforcement action with the Commission by rescinding the Notice of Revocation and paying $460,000. The resolution of the Commission's enforcement action did not address Cole's ability to pursue his claim against County.

On appeal, the California Court of Appeal rejected Cole's claims in an unpublished opinion. Pet. App. A. Relying on California state law, the court of appeal found that Cole's claims were barred by the doctrines of res judicata, collateral estoppel, and waiver. With regard to res judicata and collateral estoppel, the court held:

> Under the California Coastal Act, an aggrieved property owner must file a petition for writ of administrative mandate within 60 days to challenge the validity of an action taken by the Coastal Commission. (Pub. Resources Code § 30801.) Here, the amended complaint alleges that the commission issued the coastal development permit requiring the irrevocable offer to dedicate in May of 1980. The trustee concedes that Bushkin, the original permittee and property owner at that time, never filed an action challenging the commission's 1980 permit decision. The commission's decision, therefore, became final in 1980. . . . well established principles of collateral estoppel and res judicata preclude the trustee, as the predecessor in interest, from relitigating the validity of the commission's decision or seeking alternative forms of relief therefrom.

Pet. App. at 7a.

The court of appeal also rejected Cole's theory that he was simply attacking County's acceptance of the permit rather than the original permit issued by the California Coastal Commission. The court found that "the validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint." *Id.* at 12a. The court noted that the trustee's Notice of Revocation, which was incorporated into the amended complaint,

directly challenged the validity of the original permit through its assertion that the "exaction imposed by the Permit Condition is unconstitutional . . . " *Id.*

The California Supreme Court then denied Cole's petition for review. See Pet. App. at 20a. His petition for a writ of certiorari to this Court followed.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

A. This Court Will Not Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds.

This Court has repeatedly stated that it has no jurisdiction to review judgments of state courts that rest upon separate, adequate and independent state law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Murdock v. Memphis,* 87 U.S. 590, 636 (1875). This rule has been applied frequently, and includes the situation in which application of a state law period of limitations for asserting a property interest would bar assertion of a federal constitutional claim. See *Paschall v. Christie-Stewart,* 414 U.S. 100 (1973).

B. The Court of Appeal's Decision Is Based on California Law Barring a Landowner from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition.

Under California law, a claim for inverse condemnation arising from an administrative action must be filed within the same period of limitations as the administrative mandamus claim. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 1056-57, 32 Cal.Rptr.2d 244, 257-258 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Under the California Coastal Act, an aggrieved person must file a petition for a writ of administrative mandate within 60 days of the Coastal Commission's permit decision. Cal. Pub. Resources Code, § 30801. If a landowner fails to file a timely challenge, the Coastal Commission's permit decision becomes final, and the application of state law principles of res judicata and collateral estoppel renders the Commission's decision "immune from collateral attack, either by inverse condemnation action or by any other action." *Patrick Media Group, Inc. v. California Coastal Comm'n,* 9 Cal.App.4th 592, 608, 11 Cal.Rptr.2d 824, 833 (Cal.App. 1992).

Applying this rule, the California courts repeatedly have rejected collateral attacks on permit conditions, including public access conditions, where the time for properly challenging the Commission's decision has long since passed. See *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989) (rejecting collateral attack on access condition where landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco Holdings,* 212 Cal.App.3d 642, 260

Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990) (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors,* 26 Cal.App. 4th 516, 32 Cal.Rptr. 103 (Cal.App. 1994), *cert. denied,* 513 U.S. 1148 (1995) (failure to timely challenge permit conditions renders them immune from collateral attack by successor in interest). The California court of appeal relied on these cases in determining Cole's claim had no merit. Pet. App. 7a-12a.

In this case, the original permittee, Bushkin, never filed an action challenging the Coastal Commission's 1980 permit decision. As a result, under California law, Cole's current challenge to the 1980 permit condition is barred by the statute of limitations and doctrine of res judicata. The court of appeal's decision therefore was based on an independent and adequate state law ground requiring rejection of Cole's petition.

C. The Court of Appeal's Decision Is Also Based on California's Law of Wavier

Cole's collateral attack on the 1980 permit conditions is also barred under California's waiver doctrine. Under this doctrine, a challenge to a permit condition by a landowner or his successor in interest is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal,* 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138 Cal.Rptr. 472, 474-75 (Cal.), *app. dismissed,* 434 U.S. 944 (1977). California courts frequently have applied this rule against collateral attacks on permit conditions. *Rossco Holdings,* 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742

(waiving challenge to access condition by receiving benefits of permits and by complying with condition); see *Ojavan Investors, Inc.*, 26 Cal.App.4th at 527-28, 32 Cal.Rptr.2d at 110; *City of Santee v. Superior Court*, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (Cal.App. 1991); *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (Cal.App. 1977).

Applying this state law rule, the court of appeal in this case determined that the "permit 'runs with the land' and the trust beneficiary has succeeded to the benefits of the permit issued [to] Bushkin. The trustee cannot now challenge the condition placed on issuance of that permit." Pet. App. 11a-12a. Consequently, California's waiver doctrine constitutes another independent and adequate state law ground requiring rejection of Cole's petition.

D. Cole Cannot Avoid the Application of These State Law Principles by Arguing That the Offer of Dedication Required by the 1980 Permit Condition Would Not Meet the Standards Contained in *Nollan*.

As one way of avoiding application of these rules, Cole suggests that the offer to dedicate is unenforceable because the requirement for public access contained in the 1980 permit condition could not meet the requirements later set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Pet. at 11.

Under California law, the state courts have explicitly rejected this attempt to evade the state law of res judicata and waiver. Thus, in *Rossco Holdings* the court found that *Nollan* did not involve a situation – such as this one – where the landowner accepted and complied with the

permit conditions. *Rossco Holdings,* 212 Cal.App.3d at 654-655, 260 Cal.Rptr. at 742. Similarly, the court in *Ham* rejected the argument that *Nollan* prevented application of the res judicata doctrine, finding that it would not have been futile for Ham to file a challenge to the Commission's permit condition because the law at the time was not clear regarding the legality of the condition. *Ham*, 210 Cal.App.3d at 1497-1499, 258 Cal.Rptr. at 570-573.

Regardless of whether a challenge in 1980 would have been futile, "the res judicata consequences of a final, unappealed judgment on the merits [is not altered] by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.* at 1498 (*citing Reed v. Allen*, 286 U.S. 191, 201 (1932)); see, *e.g., Jolly v. Eli Lilly & Co.* 44 Cal.3d 1103, 1116-1117, 245 Cal.Rptr. 658, 665 (Cal. 1988) ("a change in the law . . . does not revive claims otherwise barred by the statute of limitations"). The federal rule on this point is the same. *Federated Department Stores v. Moitie,* 452 U.S. 394, 398-399 (1981). Consequently, even if *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) would have required a different result today, state law principles of res judicata do not allow Cole to relitigate the validity and constitutionality of the 1980 permit condition.[2]

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[2] Cole improperly intimates that this Court in *Nollan* struck down the Commission's entire access program and that a dedication of access is per se illegal. See Pet. at 2. *Nollan,* however, confirmed that regulatory agencies may exact property as conditions for development permits as long there is a "nexus" between the impacts of the project and the permit condition. See *Nollan,* 483 U.S. at 836-837 (describing situations in which access conditions are permissible).

II. EVEN IF IT IS NOT BARRED ON INDEPENDENT STATE LAW GROUNDS, COLE'S PETITION SHOULD BE DENIED

Even if Cole's petition was not precluded by these independent and adequate state law grounds, the petition should be denied.

A. Cole's Petition Does Not Require the Court to Resolve a Conflict Among the Lower Courts.

First, Cole does not present any issues which require that the Court resolve a conflict among decisions of the lower courts. Both the California and federal courts addressing the issue have agreed that landowners may not collaterally attack permit conditions requiring the dedication of property long after the permit was approved and the offer of dedication recorded. *Ham; Rossco Holdings*; *Daniel*; see *Leroy Land Development Co. v. Tahoe Regional Planning Agency*, 939 F.3d 696, 698-699 (9th Cir. 1991).

B. Cole's Petition Does Not Present An Important Issue of Federal Law.

Nor does Cole present an important issue of federal law. His claim is predicated on his "dual taking" theory – that the imposition of a permit condition requiring an offer of dedication constitutes one taking and that the acceptance of the irrevocable offer of dedication, is a second, "legally distinct taking." Pet. at 13. Cole, however, does not point to any reported decision, treatise, law review article

or other legal source in which this peculiar theory has ever been mentioned, much less litigated.[3] Moreover, the court of appeal's decision is not published and lacks the force of stare decisis. See Cal.Ct.Rule 977(a). Far from raising any precedential constitutional issues, this is an eccentric action by a disgruntled landowner unwilling to abide the consequences of purchasing property that he knew was subject to an irrevocable offer of dedication at the time of purchase.

Perhaps realizing how isolated his claim is, Cole refers to the "literally hundreds of other offers that the Coastal Commission coerced before this Court's decision in *Nollan*." Pet. at 18. Cole is presumptuous in acting as the spokesman for other landowners. Unlike Cole, some landowners may accept the consequences of their voluntary decision to enjoy the benefits of their development permit in exchange for recording an irrevocable offer of dedication. Other landowners, having knowingly purchased their property subject to a recorded offer of dedication, may not see themselves as "coerced" landowners. Still others may actually support public access to the California coast, especially when they themselves will obtain the reciprocal benefits of similar access easements elsewhere in the State. That a few of these landowners eventually may raise untimely objections to the acceptance of an irrevocable offer of dedication does not elevate Cole's claim to the level of an important federal issue, especially when

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[3] Cole omits to mention *Daniel*, the one reported decision in which a landowner claimed that an acceptance of an offer of dedication is a "taking."

these claims are premised on a mistaken view of California real property law. See *infra* at IIC.[4]

Cole also asserts that the Court should grant the petition to prevent the "strong-arm tactics" of the Coastal Commission when it seeks to enforce a permit condition requiring an offer of dedication. Pet. at 19. When landowners such as Cole accept the benefits of a permit and then unilaterally seek to revoke the conditions imposed on the permit, the Coastal Commission acts responsibly in enforcing the law. And, as Cole neglects to mention, the California court of appeal in Cole's San Francisco action ruled that the Coastal Commission stated a prima facie violation of the Coastal Act based on the Trust's attempted revocation of the offer of dedication. *Supra* at 4 n.3. That Cole since has agreed to pay $460,000 in settlement of the enforcement action further undermines the honesty of his attack on the Coastal Commission's propriety in enforcing the law. *Id.*

Finally, Cole argues that the Court should grant the petition because landowners have "little incentive" to contest the initial offer of dedication, thereby encouraging governments to use the offer of dedication "scheme" to circumvent the requirements of *Nollan*. Pet. at 19. This assertion is incredible. Cases such as *Hensler, Ham, Rossco,* and *Patrick Media* for years have provided landowners notice that they are legally required to bring a challenge to a permit condition when the condition is first

[4] Indeed, of the 72 outstanding offers to dedicate accepted by County, see Pet. at 4, only two landowners (Cole and Daniel) have chosen to challenge County's acceptance.

imposed, and cases such as *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) give the permittee every incentive to challenge the imposition of the original permit condition if government oversteps its authority. Notwithstanding Cole's empty claims of "coercion" and "extortion," there is no reason to create a new constitutional rule that would allow landowners to challenge the acceptance of irrevocable offers of dedication many years after they have accepted permit conditions and enjoyed the benefits of the permit. See *Leroy Land Development Co.*, 939 F.3d at 698-699 (challenge to settlement agreement imposing conditions of development five years after execution, based on a subsequent takings analysis articulated in *Nollan*, rejected because it " . . . would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind").

C. Cole's Taking Claim Is Meritless

In any event, Cole's underlying taking claim is meritless, even putting aside that it is barred by res judicata and waiver. Cole's claim that the County's acceptance of an irrevocable offer of dedication constitutes a separate compensable taking is founded on a mistaken understanding of the property "right" retained by a landowner after the landowner has recorded an irrevocable offer of dedication. As Cole properly concedes, the property interest claimed to be taken must be measured by state real property law. Pet. at 11. In Cole's view of California law, the landowner has a "legally distinct" interest for which he may assert a taking claim after an offer of dedication is accepted. Pet. at 10, 12.

There are at least two problems with this argument. First, the court of appeal concluded upon its review of the record that Cole's taking claim was founded on a challenge to the original permit because "the validity of the permit condition underlies all of the causes of action" alleged in the complaint. Pet. at 12a. The state court's interpretation of the pleadings is in effect a factual finding that rejects Cole's claim that his taking claim was directed solely at the County's acceptance of the offer of dedication.

Second, even if one chooses to disregard the state court's review of the record, Cole's theory that the County's acceptance of an irrevocable offer of dedication is a separate taking is based on his misreading of California real property law. Once the landowner records an irrevocable offer of dedication, he has conveyed away the right to exclude the public should the irrevocable offer ever be accepted and opened to the public. In this case, for example, the irrevocable offer granted by Cole's predecessor states that:

> "This Offer shall run and burden the Property and all obligations, terms, conditions, and restrictions hereby imposed shall be deemed to be covenants and restrictions on the use of the Property *from the date of recordation of this document and shall bind the Grantor and all successors and assigns.* This Offer shall benefit the State of California"

and

> "This irrevocable offer shall be binding for a period of 21 years. *Upon recordation of an acceptance of this Offer by the Grantee, this Offer and terms, conditions, and restrictions shall have the effect of a grant of easement in gross and perpetuity*

> *that shall run with the land and be binding on the parties, heirs, assigns, and successors."*

2 JA 327, 328 (emphasis added).

Therefore, although the landowner may have the qualified right to exclude others while the irrevocable offer of dedication is outstanding, that right is subject to immediate extinction once the agency accepts the offer. A public agency's acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right; it is the public's exercise of a right that the landowner explicitly conveyed away when he made the irrevocable offer of dedication. See, *e.g., Ojavan Investors,* 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110 (finding that prior landowner had waived right to challenge deed restrictions by having accepted the benefits of the permit and that current landowner can take "only the title [the prior owner] had and subject to prior recorded instruments").

As the Ninth Circuit found in *Daniel,* under both federal and California law, an irrevocable offer of dedication is like an option, and the taking of an option occurs when the option is granted, not when it is exercised. *Daniel,* 288 F.3d at 383; see *Palo Alto Town & Country Village, Inc. v. BBTC Co.,* 11 Cal. 3d 494; 502, 521 P.2d 1097, 1102, 113 Cal. Rptr. 705 (Cal. 1974) (the making of an option is an "irrevocable offer"); *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 772, 773, 192 P.2d 949, 952 (Cal.), *cert. denied*, 335 U.S. 944 (1948) (an "option contract gives the optionee a right against the optionor for performance of the contract . . . which the optionor cannot defeat by repudiating the option"). Thus, when County accepted the irrevocable offer, County's action took nothing from Cole "that had not already been taken." *Daniel*, 288 F.3d at 383.

The California authority upon which Cole relies concerns revocable offers of dedication, not irrevocable offers, Pet. at 12-13, and simply highlights that Cole's taking claim is entirely dependent on having this Court reach a different conclusion about the California law of property dedication.[5]

Finally, the determination that the acceptance of an irrevocable offer is not a taking accords with this Court's views in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, decided five years after *Nollan*, this Court acknowledged that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-29. Under California real property law, the recording of an irrevocable offer of dedication is a preexisting limitation on title that extinguishes any right to exclude the public once the irrevocable offer is accepted.

D. Cole's Ripeness Argument Is Meritless

Cole's concurrent assertion that his taking claim was not ripe until the County accepted the permit, Pet. at 15, fails for the same reason that it fails on the merits. Again,

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[5] Cole also relies on *Grupe v. California Coastal Comm'n* 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (Cal.App. 1985) to support his dual taking theory. Pet. at 13. In *Grupe*, the court upheld the Commission's imposition of a condition requiring the developer to make an offer of dedication to mitigate the impacts of his project. The court recognized the contingent nature of the residual "rights" of the landowner and that the landowner's ability to exclude existed only "*until such time as a public agency or private association agrees to accept the offer and concomitant responsibility to police the beach.*" *Grupe*, 166 Cal. App.3d at 170, 212 Cal.Rptr. at 592 (emphasis added).

Cole's argument ignores that California law requires that any challenges to permit conditions, including constitutional challenges, must be brought within the time period for challenging the underlying administrative action. See *Hensler,* 8 Cal.4th at 22, 32 Cal.Rptr. at 257-258; *Ham,* 210 Cal.App.3d at 1493, 258 Cal.Rptr. at 568; *Rossco Holdings,* 212 Cal.App.3d at 657, 260 Cal.Rptr. at 744. As the lower courts found here, Cole's attack on the County's acceptance of the offer of dedication was an attack on the original permit condition and, as in the *Nollan* case itself, any taking claim was ripe at the time that the condition was first imposed in 1980, not nineteen years later.

Moreover, the acceptance of an irrevocable offer of dedication can never arise to a taking because, as discussed, once a landowner records an irrevocable offer of dedication, he irrevocably conveys any right to exclude the public if the offer of dedication is accepted. When the County accepted Bushkin's original offer of dedication, it simply exercised the property interest that Cole's predecessor had irrevocably conveyed to the public, and that Cole had no property interest to prevent. Because a taking claim based on the acceptance of such an offer does not exist, it is pointless to consider when such a claim might "ripen."

Cole also appears to suggest that his ability to attack the 1980 permit condition was somehow resurrected by this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* indicated that a transfer of title does not necessarily bar a taking claim, even though the new owner acquires the property with knowledge of existing regulation. *Palazzolo,* however, did not eliminate the statute of limitations for taking claims, nor did it allow a subsequent landowner to assert a taking claim that the

predecessor had already lost before the transfer. As the court of appeal correctly held in this case, Cole's predecessor did not file a taking claim before the limitations period expired, but instead complied with the restriction and accepted the benefits of the permit. Therefore, Cole "acquired the property subject to an explicit recorded offer of dedication in which the prior landowner conveyed away the very property interest at stake – the right to exclude the public from the property." Pet. App. 14a. *Palazzolo* did not revive taking claims that had expired long before the new owner acquired the property.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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